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MOLLY F. FRANCK*

Introduction

Marcotulio Mendez was a twenty-eight year-old Latino male who lived in Palm Beach County, Florida.[1] One day while Marcotulio was driving home, a police officer from the Sheriff's Office began discretely following him, just a few blocks before Marcotulio reached his residence.[2] Once Marcotulio exited the car and entered his yard, the officer turned on his police car lights and drew his gun on Marcotulio.[3] Marcotulio immediately put his hands in the air and told the officer that he had done nothing wrong.[4] In

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1. Fla. Immigrant Coal. v. Mendez, No. 09-81280-CIV-MARRA, 2010 U.S. Dist. LEXIS 52473, at *2 (S.D. Fla. May 24, 2010).

2. *Id.*

3. *Id.* at *3.

4. *Id.*

front of witnesses, the officer grabbed Marcotulio by the collar, pushed him to the ground, and handcuffed him.[5] The officer proceeded to drag Marcotulio, face down, to the street.[6]

Marcotulio was arrested on May 14, 2009, and taken to the Palm Beach County Jail.[7] He was charged with a nonmoving violation, driving without a license, and resisting arrest with violence.[8] That same day, a state court judge set bond at $3,000 and Marcotulio's pastor came to the jail to post the bond.[9] However, a member of the Sheriff's Office told the pastor that "the bond would not be accepted because an Immigration and Customs Enforcement ("ICE") detainer had been issued."[10] The official did not explain that, according to the Department of Homeland Security ("DHS") regulations, once bond is offered and posted, the ICE detainer only lasts for 48 hours.[11] After 48 hours, Marcotulio should have been released from jail *unless* ICE obtained a warrant for his arrest and took him into custody.[12]

As a result, Marcotulio was unlawfully prevented from posting bond and kept in jail for over five months until ICE took him into custody on October 21, 2009.[13] Marcotulio was subsequently released on bond set by an immigration judge on November 5, 2009.[14]

Sadly, Marcotulio's experience is not unusual. Recently, a lawsuit was filed on February 2, 2011, against the Orleans Parish Sheriff's Office in Louisiana on behalf of two men unlawfully held on immigration detainers for 91 and 164 days respectively.[15]

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5. *Mendez*, 2010 U.S. Dist. LEXIS 52473, at *3.

6. *Id.*

7. *Id.*

8. *Id.* On June 15, 2009, the charges were amended to "fleeing and eluding, resisting arrest *without* violence (emphasis added) and driving without a license." *Id.*

9. *Id.*

10. *Id.* at *3-4. On July 25, 2009, Pastor Lopez again attempted to post bond for Marcotulio. *Id.* However, he was told that, "if he posted bond for Mr. Mendez, he would not only risk not getting his money back, but Mr. Mendez would not be released from jail as he would have an immigration hold." *Id.*

11. 8 C.F.R. § 287.7(d) (2011) ("Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit the assumption of custody by the department.").

12. 8 C.F.R. § 287.8(c)(2)(i) (2011). While ICE can issue a detainer under 8 U.S.C. § 1357 without articulating any degree of suspicion, ICE must have "reason to believe" the detainee is in violation of U.S. immigration laws and subject to removal before taking him into custody. *Id.*

13. *Mendez*, 2010 U.S. Dist. LEXIS 52473, at *5.

14. *Id.*

15. Plaintiffs' Original Complaint at 2-3, Cacho v. Gusman, No. 2:11-cv-00225 (E.D.

Although the 48-hour rule limits the authority of state and local law enforcement agencies ("LEAs") to keep an individual in jail once their traffic, municipal and/or state criminal charges have been resolved,[16] many of the LEAs do not abide by the rule.[17] Furthermore, at least one county has tried to argue that the law did not "clearly establish" that the local sheriff's office must have an independent criminal basis to arrest an alien before taking him to jail and contacting ICE to issue an immigration hold.[18] As a result, immigrants (or individuals who *look like* immigrants) are increasingly at risk of being unlawfully arrested, detained, and denied their right to due process.[19] State and local authorities are using the issuance of ICE detainers as retroactive justification for the initial arrest or for the continued detention of a non-citizen for days, weeks, or months after the individual's required release.[20]

This note focuses on the increasing number of cases that indicate state and local LEAs are systematically violating the due process rights of noncitizens through abuse of immigration detainers. Part I discusses federal preemption and the limits on "inherent authority" of state and local police to enforce federal immigration laws absent express agreements with ICE. It briefly summarizes the three principal mechanisms used by the federal government to permit state and local police involvement in this area. Part II describes how state and local police are abusing immigration detainers by using detainers to justify unlawful arrests and over-detention of individuals in their custody. Part III recognizes ICE's attempt to modify its immigration detainer policy in light of these harms, but concludes that proposed reforms to the agency's new

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La. Feb. 2, 2011), *available at* http:// www.nilc.org/immlawpolicy/arrestdet/Cacho-v-Gusman-complaint.pdf.

16. *Id.* at 10.

17. *See* AMERICAN IMMIGRATION COUNCIL, COMMENTS ON U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT DRAFT DETAINER POLICY (2010) [hereinafter NGO DETAINER COMMENTS], *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/NGO-DetainerCommentsFinal-10-1-2010.pdf. At least eight lawsuits were filed in federal district courts across the country between September 2008 and August 2010 against local Sheriff's offices for keeping individuals in jail on immigration detainers in excess of the 48-hour rule. *Id.* app. at 1-3.

18. Comm. for Immigrant Rights v. Cnty. of Sonoma, 2010 U.S. Dist. LEXIS 58110, at *12 (N.D. Cal. June 11, 2010).

19. Fla. Immigrant Coal. v. Mendez, No. 09-81280-CIV-MARRA, 2010 U.S. Dist. LEXIS 114726, at *12 (S.D. Fla. Oct. 28, 2010) ("Daniel Cohen, an assistant public defender in the Fifteenth Judicial Circuit has filed about 13 or 14 habeas petitions regarding ICE holds. . . . In addition, defendant's counsel has stipulated that 17 writs of habeas petitions were filed against the Sheriff.").

20. NGO DETAINER COMMENTS, *supra* note 17.

draft detainer policy are not sufficient to adequately address the problem. Part IV concludes that the distinct harms perpetrated by LEAs are, in part, a failure of Congress to properly address these issues in the text of 8 U.S.C. § 1357, which allows state and local LEAs to assist ICE in the issuance and execution of immigration detainers *without* express cooperation agreements. As a result, these LEAs are not official "immigration officers" who are bound by DHS regulations or ICE policies that set the standards for immigration enforcement activities and guard against abuse. Ultimately, this note proposes that Congress has a compelling interest to deter police misconduct by making DHS regulations and ICE policies binding on all LEAs who willingly execute immigration detainers.

I. Role of State and Local Police in the Realm of Immigration Enforcement

A. Federal Preemption and the Limits of "Inherent Authority"

Ever since Arizona governor, Janice Brewer, signed S.B. 1070[21] into law in early 2010, national debates over immigration have dominated the public discourse and precipitated a tidal wave of state legislative proposals to give states authority to regulate immigration.[22] While this note does *not* discuss the legal issues raised by states enacting their own immigration-related laws, it does begin by underscoring the legal principle affirmed in *U.S. v. Arizona* that "the power to regulate immigration is vested exclusively in the federal government."[23] Even though the Constitution's explicit textual authority for federal immigration power may appear to rest solely on the Naturalization Clause,[24] the Supreme Court has consistently ruled that the federal government's dominion over immigration is "supported by both enumerated and implied

21. S.B. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Sess. Laws 113.

22. Silvia Otero & Verónica Rosas, *Más Estados Replican Ley Contra Indocumentados*, EL UNIVERSAL (Dec. 29, 2010), http://www.eluniversal.com.mx/ nacion/182809.html. The Mexican Ministry of Foreign Affairs (SRE) registered eight initiatives similar to S.B. 1070 presented in 2010 by the following states: Missouri, South Carolina, Pennsylvania, Kansas, Minnesota, Rhode Island, Michigan, and Texas. *Id.* As of the time this newspaper article was written, seven more states (Colorado, Indiana, Maryland, Nebraska, Nevada, Oklahoma, and Ohio) were in the process of formulating similar bills. *Id.*

23. United States v. Arizona, 703 F. Supp. 2d 980, 986 n.4 (D. Ariz. 2010).

24. Anne B. Chandler, *Why is the Policeman Asking for My Visa? The Future of Federalism and Immigration Enforcement*, 15 TULSA J. COMP. & INT'L L. 209, 210 (2008).

constitutional powers"[25] including its "authority over foreign affairs."[26]

Nevertheless, the federal government has, in limited circumstances, granted state and local LEAs prescribed authority to assist with civil immigration enforcement through the so-called "287(g) agreements."[27] Furthermore, courts have recognized LEA's inherent authority to make arrests for criminal violations of the Immigration and Nationality Act ("INA").[28] The INA, also known as the McCarran-Walter Act, is the nation's complex body of immigration laws.[29] The INA, comprised of both criminal and civil provisions, establishes the rules for admission, deportation, continued lawful presence and naturalization of noncitizens.[30]

After the Ninth Circuit's widely adopted 1983 decision in *Gonzales v. City of Peoria*, state and local LEAs were acknowledged to have inherent authority to police criminal, *but not civil*, violations of the INA.[31] Criminal violations of the INA include the transporting of unauthorized aliens into or within the United States (alien smuggling),[32] entry into the United States after being formally removed or ordered deported (criminal reentry),[33] and illicit trafficking in a controlled substance (drug trafficking).[34] The court concluded that state and local enforcement of criminal provisions of the INA did not inherently conflict with federal interests, provided that individuals were stopped only when the officer had *reasonable suspicion* of a state law violation, and arrested only when the officer had *probable cause* that a criminal provision of the INA had been violated.[35] By contrast, the court held that "the civil provisions of

25. *Arizona*, 703 F. Supp .2d at 991. See also Fong Yue Ting v. United States, 149 U.S. 698, 706 (1893), and Chae Chang Ping v. United States, 130 U.S. 581, 603-04 (1889), for previous Supreme Court decisions citing the principle.

26. MICHAEL JOHN GARCIA & KATE M. MANUEL, CONG. RESEARCH SERV., R41423, AUTHORITY OF STATE AND LOCAL POLICE TO ENFORCE FEDERAL IMMIGRATION LAW 1 n.1 (2010).

27. Immigration and Nationality Act § 287g, 8 U.S.C. § 1357(g) (2011). Will be discussed more in depth in the next section.

28. *See* Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983). *See also* United States v. Urrieta, 520 F.3d 569 (6th Cir. 2008).

29. McCarran-Walter Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (commonly known as the Immigration and Nationality Act (INA)); RICHARD BOSWELL, IMMIGRATION AND NATIONALITY LAWS 3 n.2 (4th ed. 2010).

30. *Gonzales*, 722 F.2d at 474-75.

31. *Id.* at 476.

32. *See* INA § 274, 8 U.S.C. § 1324 (2011).

33. *See* INA § 276, 8 U.S.C. § 1326 (2011).

34. *See* INA § 101(43)(B), 8 U.S.C. § 1101(a)(43)(B) (2011).

35. *Gonzales*, 722 F.2d at 477 ("We further emphasize that arrests for federal offenses

the Act . . . constitute such a pervasive regulatory scheme as to be consistent with the exclusive federal power over immigration."[36] The court noted that although *entering* the U.S. without inspection (illegal border crossing)[37] is a misdemeanor, simply *being* in the U.S. without permission (unlawful presence) is a *civil offense*.[38] There are many reasons why a person could be unlawfully present in the United States including "expiration of a visitor's visa, change of student status, or acquisition of prohibited employment."[39] Thus, the court concluded that "an arresting officer cannot assume that an alien who admits he lacks proper documentation has violated section 1325" and made an illegal entry into the U.S.[40]

Not surprisingly, a sharp debate has since emerged about whether state and local LEAs, absent express federal agreements, have inherent authority to investigate *both* criminal and civil violations of the INA.[41] One of the strongest proponents of the claim that local police have inherent authority to investigate, arrest, and detain for civil immigration violations is Kris Kobach, a principal drafter of S.B. 1070.[42] Mr. Kobach and others, including U.S. Republican Senator of Alabama, Jeff Sessions, base their argument on three Tenth Circuit decisions issued between 1984 and 2001, and on an unpublished opinion authored by the Office of Legal Council ("OLC") in 2002 under the Bush Administration.[43]

The Tenth Circuit decisions, *United States v. Salinas-Calderon*,[44]

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can be justified by state law authorization only if the arrest procedures do not violate the federal constitution."(citing Ker v. California, 374 U.S. 23, 37 (1963))).

36. *Id.* at 474–75.

37. INA § 275, 8 U.S.C. § 1325 (2011); United States v. Rincon-Jimenez, 595 F.2d 1192, 1193–94 (9th Cir. 1979) (holding that under 18 U.S.C. § 3282, criminal prosecution for § 1325 is barred after five years because the offense is "consummated at the time of entry" and is not a continuing offense).

38. *Gonzales*, 722 F.2d at 476.

39. *Id.*

40. *Id.*

41. *See* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004) (arguing against inherent authority to enforce civil violations of the INA); Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005) (arguing for inherent authority to enforce civil violations of the INA).

42. Alia Beard Rau, *Arizona Immigration Law Was Crafted by Activist*, THE ARIZ. REPUBLIC (May 31, 2010), http://www.azcentral.com/arizonarepublic/news/articles/2010/05/31/20100531arizona-immigration-law-kris-kobach.html.

43. Jeff Sessions & Cynthia Hayden, *Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-First Century: The Growing Role for State and Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV 323, 334–37 (2005).

44. United States v. Salinas-Calderon, 728 F.2d 1298 (10th Cir. 1984).

United States v. Vasquez-Alvarez,[45] and *United States v. Santana-Garcia*,[46] are cited collectively for the principle that state and local police have inherent authority to enforce federal immigration law, *without distinguishing* between criminal and civil offenses.[47] However, in all three cases, the defendants were stopped for allegedly violating state traffic laws and were subsequently arrested because the officer had probable cause that the defendant was engaged in alien smuggling, criminal reentry or drug-trafficking.[48] In none of these cases did the officer admit to stopping the vehicle solely to verify the occupants' civil immigration status.[49] Therefore, it is difficult to argue that these arrests upheld by the Tenth Circuit actually provide support for an inherent authority to police civil immigration violations, given the independent criminal grounds that existed in each case.[50] As one legal scholar has previously argued, giving local police inherent authority to enforce both civil and criminal immigration violations would be like requiring an officer who responds to a domestic violence call to make sure that all parties involved have paid their income taxes or maintained compulsory liability insurance on their vehicles.[51]

Apart from the Tenth Circuit decisions, Senator Sessions and his ilk have also relied on the 2002 OLC Opinion to support the notion that "federal law did not preempt state police from arresting aliens on the basis of civil deportability."[52] Since 1978, the Department of Justice ("DOJ") has published various OLC opinions to reflect the executive branch's evolving views concerning the limitations on state and local LEAs in immigration enforcement.[53] In 1983,

45. United States v. Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999).

46. United States v. Santana Garcia, 264 F.3d 1188 (10th Cir. 2001).

47. GARCIA & MANUEL, *supra* note 26, at 15 n.80 (emphasis added).

48. *Id.* at 13–14. Defendant Salinas-Calderon was stopped for driving erratically and arrested for alien smuggling when the officer found six people in the back of truck, none of whom spoke English or carried documentation. *Id.* at 13. Vasquez-Alvarez was stopped on suspicion of drug trafficking and arrested after admitting that he had a felony record and had been previously deported from the United States. *Id.* Santana-Garcia was stopped by a Utah state trooper for an alleged traffic violation and was arrested after consenting to a vehicle search that turned up illegal drugs. *Id.* at 14.

49. *Id.* at 15 n.80.

50. *Id.* at 15.

51. Chandler, *supra* note 24, at 230.

52. GARCIA & MANUEL, *supra* note 26, at 16 [hereinafter 2002 OLC Opinion] (quoting Memorandum from Jay S. Bybee, Assistant Attorney General on the Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 8 (Apr. 3, 2002)), *available at* http://www.fairus.org/site/DocServer/OLC_Opinion_2002.pdf?docID=1041).

53. GARCIA & MANUEL, *supra* note 26, at 15.

following the Ninth Circuit's decision in *Gonzales*, the DOJ began to encourage greater involvement by LEAs in immigration enforcement, "but emphasized that federal authorities 'remain responsible for all arrests for [civil] immigration violations.'"[54] Then, in 1996, the OLC affirmed that "state and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability."[55] However, the OLC issued a new, unpublished[56] memorandum in 2002 that suddenly reversed its line of previous opinions on the subject.[57] The 2002 OLC Opinion claimed that the statements made in *Gonzales* about federal preemption of the INA's civil provisions were merely dictum, choosing instead to favor the Tenth Circuit's interpretation of inherent authority.[58]

While the Obama Administration has yet to formally rescind the 2002 OLC Opinion, the DOJ's direct challenge to S.B. 1070 clearly disavows the notion that LEAs have inherent authority to police civil violations of immigration law absent federal agreements. The Sixth Circuit concurred in a 2008 decision, *United States v. Urrieta*,[59] when it found that a local police officer did not have authority to detain the petitioner beyond the period necessary to issue him a traffic citation in order to determine if he was an unlawfully present alien.[60] The court held that "local law enforcement officers cannot enforce completed violations of civil immigration law (i.e., illegal presence) unless specifically authorized to do so by the Attorney General under special conditions that are not applicable in the present case."[61] Thus, the overriding conclusion is that states and local authorities *do not possess inherent authority to enforce civil immigration violations* without express authorization by the federal government.

54. *Id.* at 15-16 (quoting Press Release, Department of Justice (Feb. 10, 1983), *in* INTERPRETER RELEASES VOL. 60 NO. 9, at 172-173 (Mar. 4, 1983)).

55. *Id.* at 16 (quoting Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. O.L.C. 26 (1996)).

56. *Id.* at 16 n.90 (the DOJ did not make the 2002 OLC Opinion publicly available until several groups sued under the Freedom of Information Act and the DOJ was required to release a redacted version by an order from the Second Circuit in 2005).

57. *Id.* at 15-16.

58. *Id.* at 17.

59. United States v. Urrieta, 520 F.3d 569 (6th Cir. 2008).

60. GARCIA & MANUEL, *supra* note 26, at 12.

61. *Id.* (quoting *Urrieta*, 520 F.3d at 574).

II. How State and Local Police Cooperate with ICE: 287(g) Agreements, Secure Communities and the Criminal Alien Program

A. 287(g) Agreements

Although state and local LEAs do not have inherent authority to police civil immigration violations, in 1996, Congress chose to amend statute 8 U.S.C. § 1357 by adding section (g) - *Performance of immigration officer functions by State officers and employees,* to give federal immigration officials the power to deputize state officers in immigration enforcement.[62] These deputy partnerships, known as "287(g) agreements" or "Memorandums of Agreement" ("MOAs"), grant local entities the power to enforce immigration law within their jurisdictions.[63] Officers trained under the 287(g) program are authorized to carry out the functions normally reserved for federal immigration officials and do so at the expense of their local jurisdictions.[64] As of September 2, 2011, ICE had signed MOAs with sixty-nine different LEAs in twenty-four states.[65] However, the first two agreements were not made until 2002 and 2003, with eighty-eight percent of agreements signed between 2007 and 2010.[66] Consequently, MOAs are considered a relatively new phenomenon and have been the subject of many law review articles in recent years.[67] Of particular concern to legal scholars is whether the 287(g) training is adequate to prevent racial profiling and civil rights

62. INA § 287(g), 8 U.S.C. § 1357(g) (2011).

63. U.S. Immigration and Customs Enforcement, *ICE Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act,* http://www.ice.gov/news/library/factsheets/287g.htm (last visited Oct. 20, 2011) [hereinafter *287g Fact Sheet*].

64. INA § 287(g)(1), 8 U.S.C. §1357(g)(1) (2011).

65. *287g Fact Sheet, supra* note 63.

66. *Id.* The first agreements were signed by the Florida Dept. of Law Enforcement, July 2, 2002 and the Alabama Department of Public Safety, September 10, 2003. *Id.* Only eight of the sixty-nine agreements were signed before 2007. *Id.*

67. *See* Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law,* 49 ARIZ. L. REV. 113 (2007); Christine Hobbs, *Comment, State-Federal Partnerships in Immigration Enforcement: Is the Trend Right for Texas?,* 8 TEX. TECH. ADMIN. L.J. 141 (2007); Jason G. Idilbi, *Recent Development: Local Enforcement of Federal Immigration Law: Should North Carolina Communities Implement 287(g) Authority?,* 86 N.C.L. REV. 1710 (2008); Adam Blank, *Survey and Article on Florida Law: The Immigration Enforcement Multiplier: Examination of INA Section 287(g) in Light of Florida's Memorandum of Understanding,* 34 NOVA L. REV. 219 (2009).

violations in immigration enforcement, practices which the agency explicitly condemns.[68] Critics have sharply pointed out that while ICE officers must attend seventeen weeks of basic training (plus additional on-the-job field training), the ICE training course for MOA officers lasts only four weeks.[69] The other major concern about MOAs is that they create distrust of local police and strongly discourage immigrants from reporting crimes that they witness or personally experience.[70] In fact, over 100 cities and towns across the U.S. (known as "sanctuary cities") have made it a policy not to allow municipal resources to be used for immigration enforcement and do not inquire about an individual's immigration status when enforcing local laws.[71] Consequently, the International Association of Chiefs of Police (IACP) has not adopted an official position to endorse MOAs, given the widespread disagreement among members of law enforcement about whether they should be involved in civil immigration matters.[72]

B. Secure Communities

Aside from deputizing local police officers with the power to directly enforce immigration laws under 287(g), DHS has found other ways to establish cooperation between ICE and local LEAs. In March 2008, DHS announced its latest effort to identify "criminal aliens" through the *Secure Communities* program.[73] Secure Communities (often referred to as "S-Comm" by non-DHS officials) is new technology that links searches of the FBI fingerprint database with DHS immigration records.[74] During the traditional booking process, police will run a suspect's fingerprints through the FBI database looking for previous arrest or conviction records. For jurisdictions with S-Comm, that information is also cross-referenced

68. Arnold, *supra* note 67, at 116; *see also ICE Fact Sheet: Updated Facts on ICE's 287(g) Program*, U.S. Immigr. & Customs Enforcement, http://www.ice.gov/news /library/ factsheets/287g-reform.htm (last visited Oct. 15, 2011) [hereinafter *287g Update*].

69. Maria Fernanda Parra-Chico, *An Up-Close Perspective: The Enforcement of Federal Immigration Laws by State and Local Police*, 7 SEATTLE J. SOC. JUST. 321, 326 (2008).

70. Arnold, *supra* note 67, at 122.

71. Steve Salvi, *Sanctuary Cities: What Are They?*, OHIO JOBS & JUST. PAC, http:// www.ojjpac.org/sanctuary.asp (last visited Oct. 20, 2011).

72. Arnold, *supra* note 67, at 123.

73. Christopher N. Lasch, *Immigration Law: Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 173 (2008).

74. *See Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http:// www.ice.gov/secure_communities/(last visited Oct. 20, 2011) [hereinafter *Secure Communities*].

with DHS immigration records.[75] When DHS receives a "hit" from fingerprints submitted through S-Comm, local ICE officers are notified and decide if action is required.[76] Given the agency's limited resources to pursue all of the country's immigration violators, ICE claims to first prioritize the identification and removal of dangerous criminal aliens convicted of violent felonies (murder, rape, kidnapping) or who pose threats to national security. [77]

However, many localities are concerned that even folks who are arrested for minor offenses (including traffic violations) and never criminally charged, are now brought to the attention of DHS through S-Comm and deported.[78] According to ICE documents obtained by the Center for Constitutional Rights through a FOIA lawsuit, about twenty-six percent of individuals deported nationwide under S-Comm were "non-criminals," and fifty-three percent of those deported were arrested for "low-level" charges.[79] Furthermore, the documents show that "from October 2008 to October 2009, nearly five percent of about 5880 identified as 'matches' under S-Comm are actually U.S. citizens."[80]

These startling findings have prompted three large counties, San Francisco, California, Santa Clara, California, and Arlington, Virginia, to request the ability to opt out and prevent fingerprints taken by LEAs for criminal background checks from being shared with ICE.[81] They argue that S-Comm is not Congressionally authorized and amounts to federal "commandeering" of local officials and resources in violation of the Tenth Amendment's protection of states' rights.[82] Anjali Bhargava, Deputy County Counsel for Santa Clara, explains that Santa Clara County is home to a diverse immigrant community, with approximately one out of every three County residents born abroad.[83] Ms. Bhargava says that

75. *Secure Communities, supra* note 74.

76. *Id.*

77. Memorandum from John Morton, Dir. of U.S. Immigration and Customs Enforcement, to all Immigration and Customs Enforcement Emps. (Mar. 2, 2011) [hereinafter ICE Priorities], *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf (stating the agency's priorities for apprehension, detention and removal of aliens under all programs that were first published on June 30, 2010, and revised Mar. 2, 2011).

78. Connie Choi & Angela Chan, *Saying No to ICE's S-Comm Program*, ASIAN L. CAUCUS (Nov. 9, 2010), http://arcof72.com/2010/11/09/saying-no-to-ice%E2%80%99s-secure-communities-program/.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Anjali Bhargava, Deputy Cnty Counsel for Santa Clara County, Cal., at the U.C.

Santa Clara County objects to the Secure Communities program because it significantly hampers community policing and the ability to establish trustworthy relationships in the community.[84] She goes on to state that "the best way to detect and prosecute crime is to work with the community. However, if community members are afraid to call the police or fire department for fear of getting themselves (or others) civilly deported, police can no longer be effective in local crime control."[85] Meanwhile, the Obama Administration has reaffirmed the policy and declared that all local jurisdictions in the country will be required to implement S-Comm by 2013.[86]

C. Criminal Alien Program and ICE Detainers

The third mechanism used by the federal government to facilitate cooperation between state and local LEAs and ICE is the Criminal Alien Program ("CAP").[87] Like S-Comm, CAP also utilizes technology to link LEA criminal background checks with DHS immigration files. The main difference is that S-Comm relies on biometric data (fingerprints) taken after a suspect has been arrested, whereas CAP only uses a name and "numerical identifier"[88] entered into the National Crime Information Center ("NCIC") database – often during an investigatory stop.[89] In addition, as part of CAP, DHS regularly sends ICE agents to screen inmates at the local jails.[90]

Beginning in 1996, the Immigration and Naturalization Service (now "DHS") started entering sub-files of information into NCIC about noncitizens previously charged with criminal violations of immigration law.[91] However, in August 2003, Attorney General

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Hastings College of the Law Panel: *U.S. v. Arizona and the Rise of Local Immigration Policing* (Nov. 15, 2010).

84. *Id.*

85. *Id.*

86. Julia Preston & Kirk Semple, *Taking a Hard Line: Immigrants and Crime*, N.Y. TIMES, Feb. 17, 2011, at A20.

87. *ICE Criminal Alien Program Fact Sheet*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT (Mar. 29, 2011), http://www.ice.gov/news/library/factsheets/cap.htm [hereinafter *CAP Sheet*] (published on Nov. 19th, 2008 and revised on Mar. 29, 2011).

88. *FBI Fact Sheet for NCIC*, FED. BUREAU OF INVESTIGATION (examples of numerical identifiers include date of birth, social security number, driver's license number, vehicle plate number, etc.), http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm (last updated June 2, 2008).

89. *Id.*

90. *CAP Sheet*, *supra* note 87 (these agents operate under a CAP project called Enforcement and Removal Operations (ERO)).

91. *Backgrounder: Immigration Law Enforcement by State and Local Police*, NAT'L IMMIGR. F., http://www.immigrationforum.org/images/uploads/BackgrounderState

Ashcroft announced that new categories for civil immigration violators had been added to the database (without Congressional approval), hopelessly blurring the distinction between criminal and civil immigration enforcement.[92] In either case, when DHS learns that a local LEA has arrested a noncitizen, ICE will usually issue an *immigration detainer.* An immigration detainer (often referred to as an "ICE detainer" or "ICE hold") is an official request from ICE to a local LEA that the LEA notify ICE before releasing the noncitizen from criminal custody.[93] The ICE detainer is issued by submitting a Form I-247 to the jail. The detainer authorizes the LEA to keep the individual incarcerated for "a period not to exceed 48 hours" (excluding weekends and holidays) after criminal charges have been resolved.[94] The purpose of the detainer is to give ICE the opportunity to assume custody of the individual during that 48-hour period.[95] While the regulation permits an immigration officer (including a police officer deputized under 287(g)) to issue a detainer "at any time,"[96] ICE must have probable cause that the detainee is deportable and secure an arrest warrant before taking the individual into custody.[97] Immigration detainers are the "linchpin" of the 287(g), Secure Communities and Criminal Alien Program "which increasingly intertwine the state criminal justice systems with federal immigration enforcement."[98]

III. Immigration Detainers: How State and Local Police are Abusing Their Power

While immigration detainers are crucial to state and local cooperation in federal immigration enforcement, they are quite vulnerable to abuse. A recent surge of habeas petitions and federal lawsuits against local authorities pursuant to ICE holds indicates that state and local LEAs are systematically violating the due-process rights of noncitizens through abuse of immigration detainers. At least eight federal lawsuits were filed between

LocalEnforcement.pdf (last updated Aug. 2007).

92. Parra-Chico, *supra* note 69, at 328.

93. INA § 287(d), 8 U.S.C. § 1357(d) (2011); 8 C.F.R § 287.7 (2011).

94. 8 C.F.R. § 287.7(a) (2011); 8 C.F.R. § 287.7(d) (2011).

95. 8 C.F.R. § 287.7(d) (2011).

96. 8 C.F.R. § 287.7(a) (2011).

97. Telephone Interview with Kate Desormeau, Staff Attorney, ACLU Immigrants' Rights Project (Feb. 16, 2011). According to Desormeau, the "reason to believe" standard stated in 8 C.F.R. § 287.8(c)(i)-(ii) has been likened to a "probable cause" standard. *Id.*

98. NGO DETAINER COMMENTS, *supra* note 17.

September 2008 and August 2010 against local Sheriff's offices for keeping individuals in jail on immigration detainers in excess of the 48-hour rule, with new lawsuits still emerging.[99] Additionally, some of the lawsuits allege that the arrests themselves were unlawful, executed solely on the basis of suspected immigration status and without proper authority. Two prime examples are the 2008 California case, *Committee for Immigrant Rights of Sonoma County v. County of Sonoma*[100] and the 2009 Florida case, *Cote v. Lubins*.[101]

A. Using Detainers to Justify an Unlawful Arrest

In the Sonoma case, three individual plaintiffs, all Hispanic, were arrested at different times and booked into custody at the Sonoma County jail without criminal charge.[102] The first plaintiff, Sanchez-Lopez, was a passenger in a vehicle pulled over for displaying a "For Sale" sign in the car rear window.[103] Both the driver and passenger were asked to identify themselves (although California does not have a "stop and identify" statute) and Sanchez-Lopez was ordered out of the car and subjected to a pat-down search.[104] The Sonoma County Sheriff's officer then confiscated Sanchez-Lopez's wallet without having reasonable suspicion or consent.[105] Next, Sanchez-Lopez was interrogated by an ICE agent at the scene who searched his wallet (looking for proof of foreign nationality) and then allowed Sanchez-Lopez to be arrested by the Sonoma officer and taken into local custody.[106] Sanchez-Lopez spent

99. Complaint for Injunctive and Declaratory Relief and Petition for Writ of Habeas Corpus, Jimenez Moreno v. Napolitano, No. 1:11cv5452 (N.D. Ill. Aug. 11, 2011), *available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/ Jimenez et al v Napolitano et al final complaint.pdf; Amy Elmgren, *Immigration Policy: ICE Detainers Challenged By Law Suit*, LATIN AMERICA NEWS DISPATCH (Oct. 17, 2011), http://latindispatch.com/2011/10/17/immigration-policy-ice-detainers-challenged-by-lawsuit/. Jimenez-Moreno, a U.S. citizen, has filed a class action lawsuit against ICE and DHS for wrongfully issuing an immigration detainer against him. *Id.* Jimenez-Moreno has spent seven months in jail awaiting drug charges – but could have been released on pretrial bail, were it not for the invalid ICE hold. *Id.*

100. Comm. for Immigrant Rights v. Cnty. of Sonoma (*Sonoma II*), N0. C 08-4220 RS, 2010 U.S. Dist. LEXIS 58110, at *12 (N.D. Cal. June 11, 2010).

101. Emergency Petition for Writ of Habeas Corpus, Cote v. Lubins, No. 5:09-cv-91-0c-10-GRJ (M.D. Fla. 2009) (dismissed as moot).

102. Comm. for Immigrant Rights v. Cnty. of Sonoma (*Sonoma I*), 644 F. Supp. 2d 1177, 1185–86 (N.D. Cal. 2009).

103. *Id.* at 1188.

104. *Id.*

105. *Id.*

106. *Sonoma I*, 644 F. Supp. 2d at 1188.

four days in the County jail without criminal charge before he was transferred to ICE custody.[107] At no time before he was turned over to ICE was Sanchez-Lopez notified of any charges against him, informed of his right to a hearing or bond determination, examined by a neutral magistrate or non-arresting immigration officer, provided with a list of legal services, or informed that any statements he made could be used against him in removal proceedings.[108]

Although the ICE agent and Sonoma officer were conducting a joint patrol, the Sonoma County Sheriff's Office is not a participant in the 287(g) program, and thus does not have authority to stop, detain or arrest an individual for suspicion of unlawful presence.[109] Furthermore, given the facts of this scenario, the ICE agent also lacked proper authority to question and detain Sanchez-Lopez. DHS regulations state that "an immigration officer, like any other person, has the right to ask questions of anyone *as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away.*"[110] In this case, the immigration officer had restrained Sanchez-Lopez's freedom to walk away by first seizing the wallet that the Sonoma officer had confiscated from Sanchez-Lopez without his permission. Also, it would seem that Sanchez-Lopez was not free to leave given that his driver was still with the Sonoma officer who had pulled them over. In addition, the ICE agent lacked "reasonable suspicion, based on articulable facts, that [Sanchez-Lopez was] an alien illegally in the United States . . . [in order to] briefly detain [him] for questioning."[111] Stopping a car because the occupants are Hispanic or Latino is racial profiling, which ICE has made clear is "something that will not be tolerated; any indication of racial profiling will be treated with the utmost scrutiny and fully investigated."[112]

The second plaintiff in the Sonoma lawsuit, Sonato-Vega, was with his fiancée in a parking lot when they were approached by two Sonoma deputy sheriffs.[113] The deputies commented that the couple's vehicle had a broken windshield and proceeded to question Sonato-Vega about "his immigration status, his tattoos and whether

107. *Id.*
108. *Id.*
109. *287g Factsheet, supra* note 63.
110. 8 C.F.R. § 287.8(b)(1) (2011) (emphasis added).
111. 8 C.F.R. § 287.8(b)(2) (2011).
112. *287g Factsheet, supra* note 63.
113. *Sonoma I*, 644 F. Supp. 2d at 1188.

he was a gang member."[114] Without reasonable suspicion or consent, the deputies searched Sonato-Vega and went through the contents of his wallet.[115] A few weeks later, the Sonoma deputies showed up at Sonato-Vega's work and arrested him without a warrant.[116] Like Sanchez-Lopez, Sonato-Vega was held at the County jail for four days with no criminal charge, and did not receive any notices of his rights before ICE picked him up.[117]

The third plaintiff, Medel Moyado, was arrested on August 8, 2007, for disorderly conduct.[118] However, a judge told Mendel Moyado two days later that he was free to go because no charges had been filed.[119] Nevertheless, the Sonoma Sherriff's Department refused to release him from jail because he was being held on an immigration detainer.[120] Medel Moyado was held for a total of six days, not 48 hours, before he was picked up by ICE. He was then released on bond set by an immigration judge two days after ICE took him into custody.[121]

In all three instances, the plaintiffs allege that Sonoma County used the issuance of immigration detainers as justification for keeping the plaintiffs in jail after they had been unlawfully arrested, or in the case of Medel Moyado, after he was ordered released. In their complaint they assert that under the detainer provisions of 8 C.F.R. § 287.7 (one of the federal regulations created by DHS), local authorities can only use immigration detainers "to retain custody over individuals already in local custody pursuant to a valid arrest after the person would otherwise be released from local custody."[122] By contrast, the County's original argument in support of qualified immunity was that "it was not 'clearly established' law that the sheriff could not honor an ICE immigration detainer without an independent basis to make an arrest."[123] The County made an analogy to California law which "recognizes acting under a facially valid warrant to be a defense to wrongful arrests" and suggested that "sheriffs acting pursuant to facially valid immigration holds

114. *Sonoma I*, 644 F. Supp 2d at 1188.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 1189.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 1187.
123. *Sonoma II*, No. C 08-4220 RS, 2010 U.S. Dist. LEXIS 58110, at *12 (N.D. Cal. June 11, 2010).

likewise should face no liability."[124] The main problem with this assertion is that immigration holds are not the equivalent of arrest warrants and do not provide probable cause that the individual is unlawfully present in the U.S. or subject to deportation.[125] The district court recognized the retroactive justification being asserted by the County and held that "[e]ven if [the analogy] is correct, it would not provide a defense to the claims that persons were stopped without probable cause and based on racial profiling before immigration holds were issued."[126]

As of June 11, 2010, the plaintiffs were allowed to proceed with their claims for injunctive relief and damages against individual defendants in their personal capacities.[127] However, the court held that the Eleventh Amendment (which grants states sovereign immunity from being sued in federal court by someone from another state or country) barred the plaintiffs' claims against the County defendants in their official capacities.[128]

Another striking case of police making an unlawful arrest and holding the individual exclusively on the authority of an immigration detainer is *Cote v. Lubins*.[129] On February 16, 2009, twenty-three-year-old mother of three, Rita "Fany" Cote, was arrested at her home after witnessing a domestic assault between her sister and her sister's boyfriend.[130] When police responded to the 911 call, Cote's sister showed the officers bruises on her neck and pleaded with them to arrest her boyfriend.[131] However, instead of escorting her attacker outside, the City of Taveras Police "immediately asked everyone for identification to prove their citizenship."[132] Cote was arrested on an outstanding civil deportation order and taken away from her husband, Bobby, and her three small children (all four of whom are U.S. citizens).[133] At

124. *Sonoma II*, 2010 U.S. Dist. LEXIS 58110, at *16-17.

125. *Immigration Detainers: A Comprehensive Look*, IMMIGR. POL'Y CENTER (Feb. 17, 2010), http://www.immigrationpolicy.org/just-facts/immigration-detainers comprehensive-look.

126. *Sonoma II*, 2010 U.S. Dist. LEXIS 58110, at *17.

127. *Id.* at *18.

128. *Id.*

129. Emergency Petition for Writ of Habeas Corpus, Cote v. Lubins, No. 5:09-cv-91-0c-10-GRJ (M.D. Fla. Feb. 23, 2009) (dismissed as moot).

130. *See ACLU of Florida Demands the Release of Illegally Detained Woman in Lake County*, AM. CIV. LIBERTIES UNION (Feb. 23, 2009), http://www.aclu.org/immigrants-rights/aclu-florida-demands-release-illegally-detained-woman-lake-county.

131. *Id.*

132. *Id.*

133. AM. CIV. LIBERTIES UNION, *supra* note 130.

age fifteen, "Fany's parents brought her to Florida from Honduras without documentation."[134] Neither the arresting local Taveras Police, nor the Lake County Sheriff's Office ("LCSO") responsible for detaining Cote, were deputized under 287(g) to arrest and detain Cote for her unlawful presence.[135] Cote was taken to the jail without criminal charge and an immigration detainer was issued two days later.[136] The immigration detainer expired on Friday, February 20, 2009, and Cote remained in jail over the weekend.[137] On Monday, February 23, 2009, the American Civil Liberties Union ("ACLU") of Florida filed a writ of habeas corpus demanding she be released.[138] "Late that night, or early the next morning, [Cote] was shackled and driven to the side of the road where she was transferred into ICE custody."[139] The lawsuit was 'dismissed without prejudice' on March 26, 2009.[140] However, the Cote family filed a new complaint against the City of Taveras with a demand for a jury trial on January 25, 2011.[141]

B. Using Detainers to Prolong Criminal Detention

In addition to state and local LEAs using detainers to justify incarceration after an unlawful arrest (i.e., without criminal charge), the endemic practice of keeping individuals in jail under detainers in excess of the 48-hour rule, leads to "substantially longer jail stays"[142] and can have "severe collateral consequences in a person's criminal [and civil] proceedings."[143]

A four-year study in Travis County, Texas, found that individuals arrested for misdemeanor offenses and held on immigration detainers remained in jail "three-and-a-half times

134. *Id.*

135. *287g Factsheet, supra* note 63.

136. *See ACLU of Florida Demands the Release of Illegally Detained Woman in Lake County, supra* note 130.

137. *See Lake County Sheriff's Office Investigation of Immigrant Mother's Unlawful Arrest and Detention A White Wash, Says ACLU*, AM. CIV. LIBERTIES UNION OF FLORIDA (Apr. 2, 2009), http://www.aclufl.org/news_events?action=viewRelease&email AlertID=3725.

138. *Id.*

139. *See Lake County Sheriff's Office Investigation of Immigrant Mother's Unlawful Arrest and Detention A White Wash, Says ACLU, supra* note 137.

140. Judgment in a Civil Case, Cote v. Lubins, No. 5:09-cv-91-Oc-10GRJ (Mar. 26, 2009) (M.D. Fla.).

141. Docket, Cote, Rita v. City of Tavares Florida, No. 2011 CA 000220 (Apr. 5, 2011).

142. Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas*, IMMIGR. POL'Y CENTER at 12 (Feb. 2010), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Criminal_Alien_Program_021710.pdf.

143. NGO DETAINER COMMENTS, *supra* note 17, at 2.

longer" than those without detainers.[144] Similarly, those charged with felonies and subject to a detainer stayed in jail "twice as long, on average, as non-detainer felons."[145] There are a number of reasons why this occurs. First, as we previously saw in Marcotulio's case, some local LEAs "simply refuse to accept bond from persons with detainers, even though they have been granted bail by a judge."[146] In Marcotulio's lawsuit against the Palm Beach County Sheriff's Office, the "defendant's counsel has stipulated that 17 writs of habeas petitions [all with respect to ICE detainers] were filed against the Sheriff."[147] Additionally, noncitizens arrested for minor infractions (such as driving without a license or misdemeanor drug possession) usually find that an immigration detainer makes them ineligible for many jail diversion programs such as work release, outpatient drug rehabilitation, halfway houses, and probation.[148] Likewise, it is not unusual for "judges and prosecutors [to] assume the presence of an ICE detainer means that a noncitizen is undocumented and facing certain deportation" and will automatically deny bail on that ground.[149] As a consequence, defendants who are denied bail because of an immigration detainer are much more likely "to plead guilty simply to get out of jail (often times only to end up in ICE detention), regardless of the merits of their cases or viability of defenses."[150]

While there are many personal hardships associated with criminal detention prolonged by an ICE hold (loss of liberty, separation from spouse and children, missed income, etc.) an ICE hold can also have severe consequences on a person's unrelated civil proceedings. In another case involving domestic violence, a mother was arrested in Austin, Texas, after she called the police to report that her ex-husband had attempted to hit her during an argument over custody of their children.[151] "When the police arrived, they decided to arrest her because they found scratch marks on the man's neck and forearm, although he had twice before faced charges of assault and family violence."[152] As part of the CAP program, an ICE

144. Guttin, *supra* note 142, at 13.

145. *Id.*

146. NGO DETAINER COMMENTS, *supra* note 17, at 7–8 (besides Palm Beach, Florida, this practice of denying bond has also been documented in Des Moines, Iowa).

147. Fla. Immigrant Coal. v. Mendez, 2010 U.S. Dist. LEXIS 114726, at *12 n.2 (S.D. Fla. Oct. 27, 2010).

148. NGO DETAINER COMMENTS, *supra* note 17, at 13.

149. *Id.* at 10.

150. *Id.* at 11.

151. NGO DETAINER COMMENTS, *supra* note 17, at 11.

152. *Id.*

agent permanently stationed at the Travis County jail interviewed her and issued an ICE detainer, supposedly on the grounds that her mother had illegally brought her into the U.S. when she was thirteen years-old.[153] Her relatives paid a $2,000 bail for her release, not knowing that she would continue to be held on an ICE detainer.[154] After she was transferred into ICE custody, an immigration judge set bond at $11,000 and she remained in ICE custody for two more weeks while she raised the bond money.[155] In the meantime, "her two U.S. citizen children, an eight-year-old daughter and a six-year-old autistic son" had to remain with their abusive father. As a result of her ICE detention, she missed the child custody hearing and her kids were temporarily taken away from her.[156]

IV. Can the Agency's Policy on Immigration Detainers Be Reformed to Eliminate State and Local Abuse?

A. ICE Draft Detainer Policy

In an attempt to address the grievances raised by the detainer lawsuits, ICE published a new draft of its detainer policy for public comment and discussion on August 6, 2010.[157] The draft adds two new provisions, '2.3' and '3.3', both concerning 'traffic-related misdemeanors.'[158] Provision 2.3 defines traffic-related misdemeanors as, "any violation of local vehicle and traffic laws that are not considered felonies under that jurisdiction's law."[159] Provision 3.3 states, "as a general matter, immigration officers should not issue detainers against an alien charged only with a traffic-related misdemeanor unless or until the alien is convicted, unless."[160] What follows is a list of six qualifiers that *would* allow for the issuance of a detainer against someone arrested for a misdemeanor traffic offense. Basically, the qualifiers are meant to include individuals with previous criminal convictions or

153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DETAINER POLICY (Draft Aug. 6, 2010) [hereinafter ICE DRAFT DETAINER POLICY], *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/DraftICE-Detainer PolicyComment-8-1-10.pdf.
158. *Id.*
159. *Id.*
160. ICE DRAFT DETAINER POLICY, *supra* note 157.

deportation orders, as well as those whose traffic-misdemeanor involved a DUI or resulted in injury or property damage.[161] The final change in the draft (as compared to the 'Interim Policy 10074.1'[162] still in effect) is the wording at the end of provision 4.6 concerning the issuance of detainers against lawful permanent residents (LPRs). The current policy states that "immigration officers should exercise such authority judiciously and seek advice of counsel for guidance if the LPR has not been convicted of a *removable offense*."[163] The new draft substitutes the words 'removable offense' for 'criminal conviction.'[164]

The first two provisions added to the draft detainer policy emphasize that officers should not be issuing detainers for those arrested for traffic-related misdemeanors, absent more serious circumstances. However, the new draft does not acknowledge that detainers are also being placed on individuals arrested for misdemeanors other than traffic-related offenses, or for noncriminal infractions like speeding, failing to yield at a stop sign, or fishing without a license.[165] For example, in 2007, the Davidson County Sheriff's Office in Nashville, Tennessee (a 287(g) partner) issued 820 citations for fishing without a license, but took only twenty-nine of those people to jail – all of whom were immigrants.[166] Since Tennessee and other states require a Social Security number to purchase a fishing license, worth $5.50 for a one-day permit, undocumented immigrants usually cannot buy one.[167] Of the twenty-nine immigrants arrested for fishing without a license, only one third of them had "prior charges," yet nearly all of them, twenty-five people, were put into removal proceedings.[168]

When 287(g) officers jail immigrants for noncriminal offenses and place detainers on them, they are actually violating both ICE detainer policy and ICE policy for *Civil Immigration Enforcement:*

161. *Id.*

162. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, INTERIM POLICY NO. 10074.1, DETAINERS [hereinafter ICE INTERIM POLICY] (Aug. 2, 2010), *available at* http://centerforinvestigativereporting.org/files/ICEdetainerpolicy.PDF.

163. *Id.* (emphasis added).

164. ICE DRAFT DETAINER POLICY, *supra* note 157, at 3.

165. NGO DETAINER COMMENTS, *supra* note 17, at 3.

166. Chris Echegaray, *Immigrants Jailed After Fishing Without a License,* THE TENNESSEAN (Aug. 26, 2010), *available at* http://www.wbir.com/news/local/story.aspx?storyid=131972.

167. *Id.*

168. Echegaray, *supra* note 167 (it is unclear whether any of those "prior charges" were actually criminal convictions that could have made them removable).

Priorities for the Apprehension, Detention and Removal of Aliens.[169] Both versions of the ICE detainer policy require in provision 3.2 that "immigration officers shall issue detainers only after an LEA has exercised its independent authority to arrest the alien for a *criminal violation.*"[170] Thus, according to ICE, LEA arrests made exclusively for civil infractions such as fishing without a license or unlawful presence, should not trigger a detainer since they are not "criminal violations."[171] Furthermore, ICE policy for Civil Immigration Enforcement states that "[t]he removal of aliens who pose a danger to national security or a risk to public safety shall be ICE's highest immigration priority."[172] Those aliens are generally defined as individuals who are engaged in or suspected of terrorism or espionage; who have been convicted of violent felonies or who are repeat criminal offenders; who are sixteen years or older and participate in criminal gangs; or who pose a serious risk to public safety.[173] Nevertheless, it is well-documented that LEAs all across the country, from Sonoma, California to Nashville, Tennessee, are continuing to arrest and detain immigrants using ICE holds in direct contravention of the agency's policies.

B. Official NGO Comments

On October 1, 2010, the American Immigration Council ("AIC") and the Immigration Project of the National Lawyers Guild ("NLG"), along with twenty-five signatory institutions, published official comments on the draft detainer policy.[174] To make immigration detainers less permeable to abuse, the comments offer many valuable recommendations for improving the ICE detainer policy. Most of the recommendations focus on providing clearer standards for when and how detainers are issued. For example, to avoid the lodging of detainers against individuals brought to jail for noncrimnal infractions or first-time misdemeanors, the comments advocate "requiring that an individual also be arraigned for a criminal offense before issuing a detainer."[175] This would help discourage police from using racial profiling to "arrest individuals

169. ICE Priorities, *supra* note 77, at 2.

170. ICE DRAFT DETAINER POLICY, *supra* note 157, at 3; ICE INTERIM POLICY, *supra* note 162, at 2 (emphasis added).

171. *Id.*

172. ICE Priorities, *supra* note 77, at 1.

173. *Id.*

174. NGO DETAINER COMMENTS, *supra* note 17, at 3.

175. NGO DETAINER COMMENTS, *supra* note 17, at 15.

on charges they never intend to pursue."[176] Additionally, the comments recommend changing the issuance of detainers from a post-arrest to a post-conviction model for individuals who otherwise do not have a criminal basis for removal, such as LPRs and visa overstays.[177] The comments also stress the need for instructions on how to challenge and lift an improvidently granted detainer.[178] This is especially pertinent, given the increasing reliance on S-Comm and on sub-files created by DHS in the NCIC database that are often incomplete or erroneous.

Following Ashcroft's 2003 announcement that information pertaining to civil removal orders was being entered into NCIC, The Migration Policy Institute ("MPI") conducted a study to determine the NCIC's reliability.[179] Analyzing data generated by NCIC queries from 2002 to 2004, MPI found that state and local LEAs received erroneous immigration hits in almost 9,000 cases, or forty-two percent of total inquiries.[180] MPI President, Demetrios Papademetriou, commented on the disturbing results explaining that "[t]he incredibly high number of false positives in the database means that police resources, which are always stretched thin, are being wasted on detaining immigrants and non-immigrants alike who haven't done anything wrong."[181]

Finally, the comments emphasize the importance of ICE properly educating LEAs about immigration detainers and making LEAs accountable for violations of detainer rules.[182] Since there is no requirement for ICE to train LEAs about "the purpose and limited scope of detainers" or about "the role and responsibilities LEAs have regarding detainers . . . confusion among LEAs is rampant, as are violations of detainees' rights and the exposure of local jurisdictions to costly litigation and liability."[183] To establish oversight over LEAs' detention of inmates held on immigration detainers, the comments recommend that "ICE should review its records of when the detainer was issued against LEA records to confirm that the individual has not been held longer than the 48 hours permitted."[184]

176. *Id.*

177. *Id.* at 14.

178. *Id.* at 17.

179. *MPI Report Shows Database Errors Plague Immigration Enforcement*, GOV'T TECH. (Dec. 16, 2010), http://www.govtech.com/e-government/MPI-Report-Shows-Database-Errors-Plague.html.

180. *MPI Report Shows Database Errors Plague Immigration Enforcement*, *supra* note 179.

181. *Id.*

182. NGO DETAINER COMMENTS, *supra* note 17, at 18.

183. NGO DETAINER COMMENTS, *supra* note 17, at 18.

184. *Id.* at 19.

Furthermore, to ensure compliance with detainer regulations, the comments insist that ICE end relationships with LEAs that abuse detainer standards.[185]

C. Why Amending ICE Policy May Not Be Enough

For LEAs who are genuinely confused about their role and responsibilities with respect to immigration detainers, new policy guidelines and training from ICE could be extraordinarily helpful to eliminate state and local abuse of detainers. However, many of the cases reviewed in this note strongly suggest that LEAs who justify unlawful arrests on the basis of ICE detainers or who over-detain inmates on ICE holds, do so knowingly and deliberately.

In Orleans Parish, Louisiana, two Katrina reconstruction workers, Mario Cacho and Antonio Campo, were both held for *several months* after their immigration detainers expired.[186] Each filed repeated grievances with prison officials and made oral requests demanding their release, but to no avail.[187] In the case of Mario Cacho, an ICE hold was placed on him on July 31, 2009, while he was serving a short sentence for disturbing the peace.[188] He was scheduled to be released on August 21, 2009, and his ICE hold expired on August 25, 2009.[189] However, the prison refused to release him and Mario remained in local custody until February 5, 2010, when his attorney filed a complaint with the Department of Homeland Security's Office for Civil Rights and Civil Liberties ("DHS-CRCL").[190] Similarly, Antonio Campo was serving time for simple battery and was due to be released on August 12, 2009, with an ICE hold that expired on August 16, 2009.[191] Despite filing five separate complaints inside the prison and making a plea directly to the warden, Antonio remained in prison until November 15, 2009, when a federal judge granted his writ of habeas corpus and ordered him released.[192] Antonio alleges in his complaint that he "would have remained in the Orleans Parish Sheriff's custody indefinitely if

185. *Id.*

186. Plaintiffs' Original Complaint at *1–3, Cacho v. Gusman, No. 2:11-cv-00225 (E.D. La. Feb. 2, 2011), *available at* http:// www.nilc.org/immlawpolicy/arrestdet/Cacho-v-Gusman-complaint.pdf.

187. *Id.* at *7, *9.

188. *Id.* at *6–7.

189. *Id.*

190. *Id.* at *7.

191. Plaintiffs' Original Complaint at *8, *Cacho*, No. 2:11-cv-00225.

192. *Id.* at *9.

he had not taken legal action to defend his rights."[193]

Unfortunately, neither Mario nor Antonio's over-detention could be characterized as an infrequent mistake. Prior to these incidents, "Orleans Parish Sheriff Gusman ha[d] received notice on numerous occasions that his policies and practices [were] leading to regular instances of excessive and unlawful custody . . . holding New Orleans community members long beyond the expiration of ICE hold requests."[194] In fact, at a meeting with concerned community members in June 2009, "Sheriff Gusman acknowledged that ICE hold requests do not allow him to detain an individual for more than 48 hours after the resolution of their traffic, municipal, and or state criminal charges."[195]

Taking into account Sheriff Gusman's deliberate indifference to DHS regulations and ICE detainer policy, it is difficult to imagine that Orleans Parish or LEAs with a similar record of violations would readily change their behavior if ICE reformed its policies. 8 C.F.R. § 287.7 makes it abundantly clear that custody of individuals held exclusively on detainer authority shall "not exceed 48 hours" just as both versions of the ICE detainer policy require arrests by LEAs for "criminal violations" before a detainer can be issued.[196] Nonetheless, many LEAs find it easy to evade these requirements, simply because they are not enforcing immigration law directly. Unlike 287(g) partners who are deputized "immigration officers" and thus bound by DHS regulations and ICE standards for enforcement activities, most LEAs who cooperate with ICE pursuant to detainers do so informally. Under 8 U.S.C. § 1357(g)(10), state and local police officers are not required to enter into binding agreements in order to communicate information about an individual unlawfully present in the U.S. or to otherwise cooperate with the agency in the "identification, apprehension, detention, or removal" of such persons.[197] Furthermore, memorandums and policies which provide "binding interpretive guidance for executive agencies . . . cannot compel state action and do not have the same weight as an act of Congress."[198]

193. *Id.*

194. *Id.* at *10.

195. *Id.*

196. 8 C.F.R. § 287.7 (2011); ICE DRAFT DETAINER POLICY, *supra* note 157; ICE INTERIM POLICY, *supra* note 162.

197. INA § 287(g), 8 U.S.C. § 1357(g)(10) (2011).

198. GARCIA & MANUEL, *supra* note 26, at 17 n.100.

V. Why the Federal Government Has a Compelling Interest to Eliminate State and Local Abuse of Immigration Detainers by Amending 8 U.S.C. § 1357

The success of ICE programs to identify, apprehend and remove dangerous criminal aliens greatly hinges on the agency's cooperation with state and local LEAs. However, in order to accomplish this important objective, the federal government cannot turn a blind eye to unlawful arrests and over-detentions by LEAs who claim that current law exonerates these practices. Despite increased reliance on the courts to address detainer violations through habeas petitions and federal lawsuits, "civil litigation to address detainer violations is not an effective education and accountability strategy for ensuring LEA compliance with detainer regulations and policies."[199] For years, legal scholars and civil rights advocates have complained that the statutory authority for immigration detainers, 8 U.S.C. § 1357(d), *Detainer of aliens for violations of controlled substance laws,* does not sanction the type of enforcement activities carried out by ICE and its local partners.[200] Section (d) states:

> In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to *controlled substances* . . . the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.[201]

In *Committee for Immigrant Rights of Sonoma County v. County of Sonoma,* the plaintiffs argued that language of § 1357(d) limits the authority of ICE to issue detainers only for noncitizens who have been arrested for drug related offenses.[202] However, the district court disagreed, finding that the agency's interpretation of the statute (codified in 8 C.F.R. § 287.7) authorizing the issuance of immigration detainers for *any* alien in police custody suspected of

199. NGO DETAINER COMMENTS, *supra* note 17, at 9.
200. Lasch, *supra* note 73, at 191.
201. 8 U.S.C. § 1357(g)(10) (emphasis added).
202. *Sonoma I,* 644 F. Supp. 2d 1177, 1198 (N.D. Cal. 2009).

being removable "is a permissible construction of the statute."[203] The court construed "the language of § 1357 as simply placing special requirements on officials issuing detainers for a violation of any law relating to controlled substances" rather than limiting the use of immigration detainers strictly to drug offenders.[204]

The other major issue regarding the statutory authority for immigration detainers under § 1357(d) is that it fails to consider the role state and local LEAs have in the process. Instead, Congress was definitively silent on the issue, preferring to let DHS and ICE determine exactly how state and local police would be involved in the detainer process. However, when LEAs, such as the Palm Beach County Sheriff's Office in Florida, the Orleans Parish in Louisiana, or the Sonoma County Sheriff's Office in California, systematically use the issuance of immigration detainers to justify unlawful arrests or prolonged detentions in violation of DHS regulations and ICE policy, the agency is put in a very difficult spot. Given that these LEAs have not been deputized and trained under § 1357(g) as "immigration officers," they are not bound by agency rules. As the NGO Detainer Comments suggest, ICE could simply choose to terminate its informal relationship with the violative LEAs and refrain from lodging detainers against persons in their custody. However, this is not a very appealing option for the agency, given its heavy reliance on cooperation with state and local LEAs through 287(g), Secure Communities, and the Criminal Alien Program.

Alternatively, Congress could strengthen the ability of DHS and ICE to deter state and local police abuse of immigration detainers by adding the following language to § 1357(d): "Any state or local law enforcement agency that cooperates with the Department of Homeland Security in the lodging or execution of immigration detainers shall abide by the standards for enforcement activities created by the agency." By clarifying this obligation in the statute, DHS and ICE will be in a better position to enforce agency regulations and policies that preserve constitutional rights against unlawful arrest and over-detention, when an express cooperation agreement with the LEA is absent.

There is no question that the federal government has a strong interest in maintaining the integrity of our law enforcement agencies and assuring that noncitizens are treated with fairness and dignity. While the government certainly faces real security challenges with respect to "dangerous criminal aliens" identified at the top of its

203. *Id.*
204. *Id.*

enforcement priorities, there is substantial evidence to show that the majority of non-citizens being over-detained by LEAs on ICE holds do not fit this description. Finally, given that approximately three-quarters of a million immigrants become naturalized U.S. citizens every year,[205] we must keep in mind that today's immigrants are indeed, tomorrow's citizens.

205. *See Naturalization Fact Sheet*, U.S. CITIZENSHIP AND IMMIGR. SERVICES (Sept. 17, 2010), http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=b62aef6b56c1b210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.